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Wes Dutcher-Walls
University of Toronto

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AGGRAVATED DISPROPORTIONALITY: THE MERGER DOCTRINE, CONTEMPORANEOUS FELONY AGGRAVATORS, AND INTUITIVE FAIRNESS

Wes Dutcher-Walls

“Is there not something terribly amiss when such highly-educated jurists spend their time parsing the lexicon of death, arguing over . . . ‘aggravating’ and ‘mitigating’ circumstances as human lives—already shattered by abuse, poverty, and the isolation of prison life—literally hang in the balance?”

— John D. Bessler¹

This article examines two distinct but related forms of disproportionality in the law of capital murder. First, this article will examine what it calls “guilt disproportionality,” which stems from the effect of the merger doctrine as an inherent limit on the scope of felony murder liability. By excluding the most *violent* felons who have committed the most *assaultive* acts from felony murder liability – on the grounds that their felonies “merge” with the eventual accidental homicide – the merger doctrine counterintuitively results in felons who are relatively *less* violent being eligible for the death penalty. This article will engage with two scholarly attempts to rationalize and define the merger doctrine: the “redescriptive” test and the “dual culpability” test. As discussed below, the “dual culpability” test is more promising not only as a fairer definition of merger but also because it offers a conceptual framework which can be re-applied at the sentencing phase of capital felony murder trials.

Second, this article will explore the concept of what it calls “sentencing disproportionality,” which refers to the higher likelihood that murderers convicted on a felony murder theory will receive the death penalty relative to those convicted on a premeditation theory. This is because of the existence of “contemporaneous felony” aggravating circumstances (the “CF aggravator”) in many state capital sentencing statutes. The CF aggravators work by making first-degree murders to be “aggravated” – and therefore eligible for the death penalty – if the murder was committed during any of an enumerated list of felonies. After reviewing examples of Equal Protection Clause challenges to the “contemporaneous felony” aggravator from Florida in the 1980s, this essay will argue that a “duplication” challenge based on *Lowenfield v. Phelps* is a preferable way to understand and challenge the disproportionately adverse effects of this aggravating circumstance on those convicted of first-degree murder on a felony murder theory. Drawing on the dissent of Justices William Brennan and Thurgood Marshall in *Lowenfield*² this article re-applies Guyora Binder’s “dual culpability” theory in the capital sentencing context to argue that the “contemporaneous felony” aggravator should not apply when a first-degree murder conviction rests solely on a felony murder theory.³ Throughout, this article uses Florida, its sentencing statute, and its state court jurisprudence to examine these concepts.

¹ John D. Bessler, *CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS’ EIGHTH AMENDMENT* 256 (2012).

² See *Lowenfield v. Phelps*, 484 U.S. 231, 255 (1988) (Brennan and Marshall, JJ., dissenting).

³ See Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 522 (2011).



I TWO MEANINGS OF “DISPROPORTIONALITY”

“Disproportionality” takes on two different meanings, each more precise than a general sense of a punishment too severe for the crime, when we identify two separate presumptions about proportional sentencing in the guilt and sentencing phases of a capital trial. In the context of “guilt disproportionality,” addressed in Part II, this article uses “disproportionality” to describe the effect of the merger doctrine in excluding what may appear as more *morally* culpable felonies—such as aggravated assault—from the pool of available predicate felonies, while allowing felonies like robbery to be predicates for felony murder. As Finkelstein succinctly notes, the merger doctrine “has the effect of making it easier for prosecutors to prosecute [for felony murder] defendants who have committed less severe crimes, as compared with those who have committed more serious ones.”⁴ Similarly, Binder suggests that, from the perspective of moral views on fairness and proportionality, the limitation of “assaultive” offences from being predicate felonies becomes less compelling as those offences become more dangerous or violent.⁵ The comparison underlying “guilt disproportionality” is amongst defendants who committed felonies in which an accidental killing resulted: those defendants who committed assaultive and therefore “merge-eligible” are one group and those defendants who committed non-assaultive felonies that cannot be merged are the comparator group.

In the context of “sentencing disproportionality,” discussed in Part III, this article uses “disproportionality” to describe the adverse effects of the “contemporaneous felony” factor (the “CF aggravator”) on offenders convicted of first-degree murder on a felony murder theory. Here, the comparison is amongst a narrower pool of defendants: those *convicted* of first-degree murder—either on a premeditation or felony murder theory—from the perspective of an offender about to enter the sentencing phase of a bifurcated capital trial. Those defendants convicted on a premeditation theory are one group, and those convicted on a felony murder theory are the comparator group.

II “GUILT” DISPROPORTIONALITY AND THE MERGER DOCTRINE

Felony Murder in the United States

Felony murder in this article refers to the theory upon which a defendant can be convicted of first-degree murder on the basis of even an accidental homicide that took place during a felony, even without a finding of *any* particular *mens rea* towards the resulting death. There are varying requirements as to the degree to which the killing must be related to the felony; for example, it is generally required that the killing be “in furtherance” of the felony.⁶ However, with regard to the concept of “guilt disproportionality,” the focus here is on the processes by which some felonies may serve as predicates for felony murder convictions and others may not.

⁴ Claire Finkelstein, *Merger and Felony Murder*, in *DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW* 219, 219 (R.A. Duff and Stuart Green eds., 2005).

⁵ Binder, *supra* note 3, at 522.

⁶ Kimberly Kessler Ferzan, *Murder After the Merger: A Commentary on Finkelstein*, 9 *Buff. Crim. L. Rev.* 561, 563 (2006); *see also* Binder, *supra* note 3, at 518.



Forty-five states have a felony murder provision in their murder statutes.⁷ One reason this essay focuses on Florida as a site of analysis is that its murder statute has a particularly long list of potential predicate felonies for the purposes of the felony murder theory. Florida lists at least nineteen predicates in § 782.04(1)(a)(2), whereas North Carolina, for example, lists only six predicates with a catchall category for other felonies committed with a weapon in its statute.⁸ Regardless of its scope, felony murder remains a controversial criminological theory. Guyora Binder suggests that advocates of the felony murder rule see it as “work[ing] in conjunction with other rules of criminal liability to map a particular society’s moral intuitions about violence and malice.”⁹ Similarly, Claire Finkelstein notes that “one of the most common rationales offered for felony murder is the advantage it affords the state in meeting its deterrence goals.”¹⁰

Critics of felony murder often emphasize its incongruity in a modern, rational penal code. For example, Justice William Brennan of the United States Supreme Court, in a dissent to a decision upholding accomplice felony murder, wrote that felony murder is a “living fossil.”¹¹ Sudduth goes further, claiming that it is a “barbaric anachronism.”¹² However, more importantly for the purposes of this article, criticisms of the felony murder rule may often be expressed in the terms of proportionality and disproportionality.

There is experimental research suggesting that the public views the death penalty as a disproportionate punishment for felony murder.¹³ A *Yale Law Journal* editorial comment from 1957 argues that the “indiscriminate grouping of crimes characterized by a specific design to kill with crimes marked by the commission of a felony undermines the principle of culpability based on mental state,” and therefore that felony murder should be abolished.¹⁴ Further, major constitutional challenges to the imposition of the death sentence for felony murder center on disproportionality, in some cases with success, as in *Enmund v. Florida*, where the Court reversed a death sentence for a getaway car driver convicted on an accomplice theory of liability for felony murder: “the Court clearly intended to protect a defendant convicted of felony murder from suffering a punishment that was cruel and unusual because of its disproportionality.”¹⁵ The California Commission on the Fair Administration of Justice, in its 2008 final report, recommended that first-degree murder on a felony murder theory should no longer result in eligibility for the death penalty.¹⁶ Below, this article will propose the more modest reform of prohibiting the consideration of the CF aggravator when the first-degree murder conviction is based on a felony murder theory, reflecting the ideal of “dual culpability” sentencing. The California Commission has recommended this reform in the alternative for jurisdictions which chose to retain felony murder as a capital crime.¹⁷

⁷ Binder, *supra* note 3, at 544.

⁸ See FLA. STAT. ANN. § 782.04(1)(a)(2) (West 2016); N.C. GEN. STAT. ANN. § 14-17(a) (West 2013).

⁹ Guyora Binder, *The Origins of the American Felony Murder Rule*, 57 STAN. L. REV. 59, 207 (2004).

¹⁰ Finkelstein, *supra* note 4, at 228.

¹¹ Norman J. Finkel and Stefanie F. Smith, *Principals and Accessories in Capital Felony-Murder: the Proportionality Principle Reigns Supreme*, 27 L. & SOC’Y REV. 129, 132 (1993).

¹² Tamu Sudduth, *The Dillon Dilemma: Finding Proportionate Felony-Murder Punishments*, 27 CAL. L. REV. 1299, 1326 (1984).

¹³ Finkel and Smith, *supra* note 11, at 134.

¹⁴ Case Comment, *Felony Murder as a First Degree Offense: An Anachronism Retained*, 66 YALE L.J. 427, 433 (1957).

¹⁵ Douglas W. Schwartz, *Imposing the Death Sentence for Felony Murder on a Non-Triggerman*, 105 STAN. L. REV. 857, 866 (1985); see also *Enmund v. Florida*, 458 U.S. 782 (1982).

¹⁶ CAL. COMM. ON THE FAIR ADMIN. OF JUST., FINAL REPORT at 138-39 (2008).

¹⁷ *Id.* at 139.



The merger doctrine

Given the concerns over the potential disproportionality caused by the felony murder rule, scholarship has focused on its structural and theoretical limits. The merger doctrine is an important example of these limits.¹⁸ It operates by disqualifying felonies such as aggravated assault or manslaughter from being felony murder predicates because they are too similar to the accidental killing itself. This principle extends back to the “intellectual birth” of the felony murder doctrine.¹⁹ A merger doctrine of some kind is generally seen as necessary for preserving the integrity of a graded homicide scheme: without it, all homicidal felonies including manslaughter would become murder,²⁰ and prosecutors could uniformly bring first-degree murder charges on a felony murder theory to sidestep the question of *mens rea* and preclude the defendant from using defenses such as provocation.²¹

The “redescriptive” test

Some scholars have attempted to articulate rationales for the merger doctrine or reformulate the doctrine itself to satisfy *post hoc* justifications for it. The prescriptive or normative disagreement over the value of the doctrine is tied up with a descriptive or analytical disagreement over what the doctrine actually is, and how it does or should operate. For example, Claire Finkelstein sees the merger doctrine as a requirement that the offender engage in two separate “acts” in order to be liable for felony murder.²² Accordingly, in articulating her own

concept of the merger doctrine, she rejects the prevailing “independent felonious purpose” test and puts forward what she calls the “redescriptive” test.²³ Under this formulation of merger, a predicate felony will merge only when the “act in virtue of which the defendant satisfies the offence definition for the predicate felony can itself be *redescribed* in terms of the resulting death,” therefore failing felony murder’s two-act requirement.²⁴ [Emphasis added.] To provide a limiting principle,²⁵ Finkelstein suggests that the causal relationship needed to satisfy the “redescriptive” test is broken by “unusual interventions” such as another person’s actions.²⁶

Importantly, Finkelstein presents the “redescriptive” test in the language of intuitive conceptions of fairness: the test will produce “fairly intuitive results for a range of cases.”²⁷ She goes on to suggest that there should be “no objection to allowing lesser felonies to serve as the predicate [for felony murder]” as long as they cannot be redescribed as the killing itself, *even if they are not inherently dangerous*. In light of these statements, Finkelstein lays out a striking sampling of the results of her “redescriptive” test: both assaulting and starving a child to death could be “redescribed” as—and merged into—the ultimate killing, but entering a home with the intent to assault could not be “redescribed” as a resulting accidental death, and thus could result in felony murder liability.²⁸

Finkelstein’s attempt to justify the merger doctrine as she defines it through an appeal to intuitive senses of proportionality appears less than completely successful. Ferzan and

¹⁸ David Crump & Susan Waite Crump, *In Defence of the Felony Murder Doctrine*, 8 HARV. J. L. & PUB. POL’Y REV. 359, 377 (1985); see also Binder, *supra* note 9, at 186.

¹⁹ Binder, *supra* note 9, at 90.

²⁰ Crump & Crump, *supra* note 17, at 378.

²¹ Finkelstein, *supra* note 4, at 227.

²² Finkelstein, *supra* note 4, at 229.

²³ *Id.* at 223, 229.

²⁴ *Id.* at 230.

²⁵ See *id.* at 231; see also Ferzan, *supra* note 6, at 565.

²⁶ Finkelstein, *supra* note 4, at 234.

²⁷ *Id.* at 230.

²⁸ *Id.* at 236.



Binder criticize Finkelstein for what Ferzan calls the “false conceptual premise” that felony murder requires two acts.²⁹ Further, both note how Finkelstein’s test could exclude paradigmatic felony murder predicates such as robbery and rape,³⁰ or even arson.³¹ Disputing Finkelstein’s claim to intuitive fairness, Ferzan suggests that the “redescriptive” test would in fact result in “counterintuitive results in paradigmatic cases.”³²

A unifying theory: dual culpability

A preferable test for the merger doctrine is the “independent culpability” or “dual culpability” test set out by Binder.³³ In brief, Binder’s test requires either an independent culpable purpose—that is, a purpose of harming some interest other than physical integrity of the eventual victim—or simply a knowing acceptance of or reckless indifference towards an independent harm.³⁴ Whereas Finkelstein’s merger doctrine requires two *acts* for felony murder, Binder’s merger doctrine requires two *forms of culpability*.³⁵ In most cases of felony murder, these two culpabilities are an indifference to the risk of death and an intent towards the felony.³⁶ As a preliminary matter, this emphasis on individual culpability seems to align more comfortably with the emphasis on moral blameworthiness in seeking proportionality than Finkelstein’s ontological-linguistic parsing of the defendant’s outward actions.

One of the strongest arguments Binder offers in favour of his “dual culpability” theory of merger is that it is already implicitly at work in a majority of felony murder statutes in the United States through the explicit enumeration of felonies.³⁷ Binder writes that legislatures use what he terms a “covert merger limitation” in enumerating only predicates “requiring sufficient culpability to satisfy the principle of dual culpability.”³⁸ Twenty-five of the forty-five felony murder jurisdictions enumerate predicate felonies exhaustively, and of these twenty-five only two allow assault of the victim to serve as a predicate.³⁹ In this way, Binder’s concept of “dual culpability” provides a compelling theoretical rationalization of existing state legislative frameworks.

Guilt disproportionality

Regardless of the philosophical justifications or rationalizations for the merger doctrine, the result is still that the more violent and assaultive felonies become, the more likely it is that they will merge with the homicide and preclude the offender from being convicted of first-degree murder on a felony murder theory. This means that a hypothetical offender who was committing a felony which does not inherently involve violence, such as burglary, and whose only homicidal act was accidental (for example, through the unintended discharge of his or her firearm) could be convicted in a state such as Florida of first-degree murder. At the same time, any number of more *intuitively* morally blameworthy offenders such as one who beats a child to death,⁴⁰ could escape first-degree murder liability, depending on the exact parameters of the merger limitation used.

²⁹ Ferzan, *supra* note 6, at 562; Binder, *supra* note 3, at 522.

³⁰ Binder, *supra* note 3, at 522.

³¹ Ferzan, *supra* note 6, at 567.

³² *Id.* at 576.

³³ Binder, *supra* note 3, at 521.

³⁴ *Id.* at 519-20.

³⁵ See Finkelstein, *supra* note 4, at 229; Binder, *supra* note 3, at 521.

³⁶ Binder, *supra* note 3, at 522.

³⁷ *Id.* at 543.

³⁸ *Id.* at 550.

³⁹ *Id.* at 544. The two states are Wisconsin and Ohio.

⁴⁰ See Finkelstein, *supra* note 4, at 236.



Under a literal application of Finkelstein's "re-descriptive" merger test, it is possible that even the paradigmatic predicate of arson, itself an intuitively blameworthy act, could "merge" out of the scope of felony murder.⁴¹ Even leaving aside the question of what proportional punishment for each of these offences would be, from the perspective of relative culpability the criminological framework set out by felony murder and merger theories may result in relatively more frequent first-degree murder convictions for offenders who have committed less serious predicate felonies, as compared with those who have committed more serious ones.⁴²

Ferzan writes that it is "perfectly legitimate" to limit the scope of felony murder liability to predicates such as rape and robbery which are inherently dangerous.⁴³ Without challenging the validity of this statement, it can nonetheless be said that felony murder, as moderated by the merger doctrine (however defined), does exclude felonies that are not only inherently dangerous but *violent* and *assaultive* by definition. The necessity of some form of merger doctrine in maintaining a graded homicide system is obvious;⁴⁴ however, the ostensible price to be paid is that *some* accidental homicides result in death penalty liability while others do not. More worrisome is that this distinction does not always correspond with the intuitive moral blameworthiness of the underlying felony.

⁴¹ Ferzan, *supra* note 6, at 567.

⁴² See Finkelstein, *supra* note 4, at 219.

⁴³ Ferzan, *supra* note 6, at 569.

⁴⁴ See Finkelstein, *supra* note 4, at 227; see also Crump & Crump, *supra* note 17, at 378.

III SENTENCING DISPROPORTIONALITY

Contemporaneous Felony Aggravators

The primary legislative response to the United States Supreme Court's invalidation of existing capital sentencing statutes in *Furman v. Georgia* was the creation of lists of "statutory aggravators," usually numbering between six and twelve in most states.⁴⁵ Contemporaneous felony aggravators ("CF aggravators") are aggravating factors contained in sentencing statutes that allow the fact that a first-degree murder took place during a felony to weigh against the defendant for sentencing purposes, both as the one required minimum "gateway" aggravator and when the jury is weighing aggravating and mitigating factors.⁴⁶ The CF aggravator, along with the "vile murder" aggravator,⁴⁷ leads to more defendants becoming death-eligible and to more carried-out death sentences than all other statutory aggravators.⁴⁸

⁴⁵ David C. Baldus, George Woodworth, & Charles A. Pulaski, Jr., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 22 (1990).

⁴⁶ In Florida's sentencing statute, the CF aggravator is phrased as follows: "Aggravating factors shall be limited to the following [. . .] (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb" (§ 921.141(6)(d)).

⁴⁷ Allowing death penalty eligibility if it is established that the murder was uniquely depraved in some way, variously defined.

⁴⁸ Baldus, Woodworth & Pulaski, *supra* note 44, at 22. See also Cathleen Burnett, WRONGFUL DEATH SENTENCES: RETHINKING JUSTICE IN CAPITAL CASES 86 (2010).



The central problem this article seeks to identify and explore is that the CF aggravator may be considered during sentencing for first-degree murder convictions on a felony murder theory, including ones that may be examples of “guilt disproportionality” due to the merger doctrine (see above). The most obvious objection to this—and one that has reached the Supreme Court in *Lowenfield* regarding another statutory aggravator—is that the CF aggravator refers to the same factual matter as the crime of first-degree murder itself when proven on a felony murder theory.⁴⁹ The fact of the predicate felony appears, and can be dispositive, at both guilt and sentencing phases. The operation of the CF aggravator in felony murder sentencing bypasses the jury’s initial role of finding the minimum “gateway” aggravator, while at the same time potentially creating a reverse onus for the convicted felony murderers to adduce mitigating circumstances in order to avoid death.⁵⁰

Purpose Confusion: Defining the “Target” of the CF Aggravator

In the context of felony murder, one example of the “dual culpability” theory of merger is the felony of burglary, for the purpose of assaulting someone within the domicile. Here, an assaultive or homicidal intention motivates the felony of burglary in the first place. Under both Finkelstein’s more permissive “re-descriptive” test and Binder’s “dual culpability” test, described above, this is a paradigmatic example of a non-merged felony.⁵¹ Though from a historical perspective, burglary is well-established as a predicate felony,⁵² it nonetheless is useful to inquire as to what the penological or punitive rationale is for allowing burglary to serve as a predicate for the elevated crime of felony murder. Binder notes that one Oregon court stated that the purpose of felony murder liability in cases of burglary-assault leading to homicide is to provide added protection for people in dwelling places, presumably through general deterrence.⁵³ Similarly, the New York Court of Appeals cited deterrence-based reasoning about the particular vulnerability of victims in homes.⁵⁴ Similarly, in the context of homicidal child abuse, the predicate felony *seems* like assault and therefore a prime candidate for merger. However, it is not merged, a result that Binder’s “dual culpability” analysis rationalizes not in terms of independent felonious *purpose* but rather independently culpable *attitudes*: the necessity for punishing the indifference or hostility towards the interests of a vulnerable individual such as a child.⁵⁵ Thus, the predicate felonies

⁴⁹ See *Lowenfield v. Phelps*, 484 U.S. 232, 232 (1988).

⁵⁰ See *White v. State*, 403 So.2d 331, 335 (Fla. 1981). See also *Teffeteller v. State*, 439 So.2d 840, 846 (Fla. 1983). The habit of some scholars and even judges to refer to the CF aggravator simply as “felony murder” contributes to the sense that statutes such as Florida’s create an automatic death penalty for first-degree murder convictions on a felony murder theory. See, e.g., Sara Colón, *Capital Crime: How California’s Administration of the Death Penalty Violates the Eighth Amendment*, 97 CAL. L. REV. 1377, 1413 (2009); Binder, *supra* note 3, at 519; Burnett, *supra* note 47, at 95. In its decision in *Lukehart v. State*, the Florida Supreme Court makes reference to the “felony murder aggravator.” 776 So.2d 906, 925 (Fla. 2000). To a layperson or to a capital defendant this may well lead to the not-entirely-mistaken understanding that a conviction for felony murder leads inexorably to the death penalty.

⁵¹ See Finkelstein, *supra* note 4, at 236; Binder, *supra* note 3, at 537.

⁵² Binder, *supra* note 9, at 190.

⁵³ Binder, *supra* note 3, at 537.

⁵⁴ See Finkelstein, *supra* note 4, at 226; Crump & Crump, *supra* note 18, at 380.

⁵⁵ Binder, *supra* note 3, at 524.



of child abuse and burglary can be understood not simply as separate acts apart from the accidental homicide, but as proxies, respectively, for other forms of culpability.

The question of the “target” of the punitive and deterrent effects of felony murder sentences raises important and troubling concerns about the operation of the CF aggravator in capital felony murder cases. What *specifically* is the added capital liability created by the aggravator meant to punish, or deter, apart from the elements of felony murder itself *already considered at the guilt stage*? In *Carter v. State*, the Florida Supreme Court suggested that a jury could give additional weight to the CF aggravator for the appellant’s burglary when deciding on the appropriate sentence for the two intentional murders he committed within, but *not* when deciding on the appropriate sentence for the accidental killing of his intended victims’ daughter when his gun unexpectedly discharged.⁵⁶ According to the court, the reason for this is that assaulting them was Carter’s goal in unlawfully entering the home in the first place.⁵⁷ However, in a hypothetical situation in which the sole homicide was the accidental death of the daughter, this description of the valid “target” of the deterrent effect of the CF aggravator—Carter’s unlawful entry into the home in the first place—is less compelling. In other words, a defense of the CF aggravator that relies specifically on connecting the *motive* of a (premeditated) murderer in committing a felony to the eventual homicide may falter when called upon to justify the use of the CF aggravator for felony murderers. These could include offenders who either cannot be said to have had the necessary *mens rea* for premeditation due to lack of neces-

sary evidence, as in *Menendez v. State*,⁵⁸ or for whom the evidence strongly suggests a mere accident, as in *Rembert v. State*.⁵⁹

This concern over the intended “target” of deterrence or punishment exists for other statutory aggravators as well. Garnett argues that the additional deterrent effect of the “heinous, cruel, and depraved” aggravator, as opposed to that of a non-aggravated first-degree murder conviction, is questionable because its “target” is the would-be-murderer’s conscience.⁶⁰ The content of what this aggravator communicates about a first-degree murder is simply that it is “bad”—a normative statement that one would expect to be a given if the case has reached capital sentencing, and therefore of questionable value as a “discretion-narrowing device” required by post-*Furman* sentencing statutes.⁶¹ Garnett contrasts this with the common aggravator that the murder victim was a police officer.⁶² Garnett suggests that this aggravator *does* succeed in communicating something discrete about the crime distinct from a mere description of the underlying offence to “filter through to the consciousness of a prospective killer in a way that might make him think twice” about committing specific acts.⁶³ For example, the po-

⁵⁸ *Menendez v. State*, 419 So.2d 312, 314 (Fla. 1982). An eyewitness saw Menendez emptying a safe in a jewelry store, but there was no direct evidence of Menendez having killed anyone in the robbery. The store clerk’s body was later discovered and police retrieved items from the store in Menendez’s apartment.

⁵⁹ *Rembert v. State*, 445 So.2d 337, 338 (Fla. 1984). Rembert entered a fishing supply store and hit the elderly shop owner once on the head in order to gain access to the till. The victim died hours later from gradual blood loss.

⁶⁰ Richard W. Garnett, *Depravity Thrice Removed: Using the ‘Heinous, Cruel, or Depraved’ Factor to Aggravate Convictions of Nontriggermen Accomplices in Capital Cases*, 103 YALE L.J. 2471, 2495-96 (1994).

⁶¹ *Id.* at 2482; See also *Lowenfield v. Phelps*, 484 U.S. 231, 232 (1988).

⁶² Garnett, *supra* note 60, at 2495-96.

⁶³ *Id.*

⁵⁶ *Carter v. State*, 980 So.2d 473, 483 (Fla. 2008).

⁵⁷ *Id.*



lice victim aggravator may indeed cause a would-be capital defendant to think twice before firing a weapon in the direction of a police officer as part of an attempt to avoid arrest during a felony gone wrong, if we are to assume that this would-be murderer is familiar with the state's capital sentencing statute.

Just as the “heinous, cruel, and depraved” aggravator is broad enough to be merely a normative restatement of the wrongfulness of first-degree murder as such,⁶⁴ the CF aggravator is simply a repackaging of the factual matter underlying a felony murder conviction in the first place. Arguably, there is nothing the CF aggravator could deter or punish apart from that which is already deterred or punished by the operation of the felony murder rule at the guilt phase of the trial. Returning to the burglary-homicides at issue in *Carter v. State*, the guilt-phase jury had already “used” the discrete form of culpability based on Carter’s violation of the interest in property and the security of his victims’ domicile as a basis for singling out the accidental killing of his victims’ daughter from the pool of all accidental homicides to receive the additional symbolic and penal opprobrium of a first-degree murder conviction on a felony murder theory. From the perspective of the scholarly accounts here, *this much* is legitimate.⁶⁵ However, it is less easy to justify the *second* use of the discrete form of culpability reflected in the act of burglary to single out for capital punishment this (accidental) first-degree murder, this time from the complete pool of all first-degree murders, including premeditated murders. As Binder suggests, felony murder is *itself* an “aggravator,” increasing liability for an unintended killing to liability for

first-degree murder on the basis of a felony.⁶⁶ Accordingly, *Lowenfield* presents compelling arguments that the same factual matter should not be permitted to “aggravate” an accidental homicide to murder and then “aggravate” that murder to death-eligible murder.

Equal Protection Challenges

The jurisprudence of the Supreme Court of Florida provides examples of cases in which capital defendants have attempted to mount constitutional challenges to the sentencing statute under the Equal Protection Clause of the Fourteenth Amendment. An early example of this is *White v. State*. The defendant in that case was one of a group of men who shot and killed six individuals during a home invasion-style robbery.⁶⁷ On appeal to the Florida Supreme Court, the defendant claimed that the CF aggravator violated equal protection rights for defendants who were convicted on a felony murder theory of first-degree murder. This was because the factual matter underlying a felony murder conviction would almost always engage the CF aggravator automatically: “the [felony murderer] enters the sentencing hearing with one aggravating circumstance already in existence . . . while in contrast the individual who has committed murder with a premeditated design to take the life of his victim has no such aggravating circumstance held against him.”⁶⁸ The effect of this, according to *White*, was that the state paradoxically had to prove *more* against a premeditated murderer at the sentencing phase than against a felony murderer. Put another way, the felony murderer carries a heavier evidentiary burden of adducing evidence of mitigating circumstances relative to the premeditated murderer. The Florida

⁶⁴ *Id.* at 2482.

⁶⁵ See *Crump & Crump*, *supra* note 18, at 379-80; Finkelstein, *supra* note 4, at 226; Binder, *supra* note 3, at 537.

⁶⁶ Binder, *supra* note 3, at 519.

⁶⁷ *White v. State*, 403 So.2d 331, 332 (Fla. 1981).

⁶⁸ *Id.* at 335.



Supreme Court responded to White's equal protection claim with an argument founded on the internal logic of the state's capital sentencing statute: "the fact that the mitigating circumstances listed in section § 921.141(6) are not exclusive removes much of the force of the defendant's equal protection argument [. . .] a defendant remains free to argue as a mitigating circumstance that he did not intend to kill the victim [...] the mere existence of an aggravating circumstance does not mandate imposition of the death sentence."⁶⁹

This is an unsatisfying response to a compelling constitutional claim identifying a real concern about Florida's capital sentencing statute. Indeed, a felony murderer is as free as a premeditated murderer to adduce mitigating circumstances at sentencing. In addition, it is true that the mitigating circumstance of lack of intent to kill is available to felony murderers but not to premeditated murderers.⁷⁰ However, the fact remains that in the unlikely but reasonable hypothetical case in which there are no aggravating or mitigating circumstances other than the CF aggravator, the premeditated murderer could potentially avoid the death penalty altogether whereas the felony murderer could potentially face death. Further, the conceptual uncertainty as to the "target" of the deterrent effects of the CF aggravator, discussed above, raises concerns about whether this weighting of the scales against felony murderers at sentencing is actually *worth* anything in the pursuit of a state's legitimate penological goals.

Admittedly, it is not clear that the Equal Protection Clause was the appropriate vehicle for developing a constitutional challenge to the CF aggravator. The first hurdle that White would have faced, had the Florida Supreme

Court engaged substantively with the merits of his equal protection claim, would have been establishing Fourteenth Amendment protection in the first place under the strict "disparate impacts" standard set out in *Washington v. Davis*.⁷¹ Without going too far into the Fourteenth Amendment jurisprudence at issue, if the Supreme Court was willing to reject a "disparate effects" claim relating to a class (African-Americans) putatively at the core of Fourteenth Amendment protection⁷² it is hard to imagine that a court would be willing to entertain a challenge to the use of the CF aggravator at felony murder sentencing on the basis of disparate effects alone. Had White somehow established that the Equal Protection Clause *was* engaged by the CF aggravator's disparate adverse impacts on felony murderers, he would still have had to establish that this discriminatory effect was not justified, which would almost certainly have been decided under the state-friendly "rational relations" standard of scrutiny. It is easy to imagine a state attorney general constructing an argument based on an appeal to the state's legitimate interest of deterring the commission of dangerous felonies.

In *Mills v. State*, the Florida Supreme Court responded in greater depth to the appellant's constitutional challenge to the CF aggravator in a felony murder case.⁷³ Interestingly, the court rejects Mills' equal protection claim in the rhetoric of deference to legislative decision-making reminiscent of the paradigmatic rational relations cases: "[t]he legislative determination that a first-degree murder that occurs in the course of another dangerous felony is an aggravated capital felony is reasonable."⁷⁴ This

⁶⁹ *Id.* at 336.

⁷⁰ *Id.*

⁷¹ *See generally* *Washington v. Davis*, 426 U.S. 229 (1976).

⁷² *Id.* at 239.

⁷³ *See* *Mills v. State*, 476 So.2d 172 (Fla. 1985).

⁷⁴ *Id.* at 178.



deference to legislative wisdom about felony murder's seriousness is problematic. Even academic authors defending the continued existence of felony murder present their defenses in terms of the *comparability* of felony murder with premeditated murder, not the relatively *greater* seriousness or moral blameworthiness of felony murder. As Crump and Crump write, felony murder reflects the "widespread public perception that a [felony] resulting in death is not simply a more serious version of the underlying felony, but is a qualitatively different crime, comparable in seriousness to other murders."⁷⁵ In this formulation, the fact that felony murder involves the death of the victim of a felony (or a third party during a felony) distinguishes it in terms of moral blameworthiness from non-homicidal felonies; it does *not* distinguish it in terms of moral blameworthiness from premeditated murder in a way that justifies a more onerous sentencing procedure for felony murderers.

***Lowenfield* Challenges and Duplication**

A challenge to the operation of statutory aggravators, which is related to but distinct from equal protection claims, reached the Supreme Court of the United States in and *Lowenfield v. Phelps*.⁷⁶ In *Lowenfield*, the Court held that a death sentence does not violate the Eighth Amendment simply because the one statutory aggravator found "duplicates" an element of the underlying conviction.⁷⁷ In this case, the defendant had killed five people, and challenged his death sentence in Louisiana on the grounds that the "multiple victim" aggravator simply duplicated a factual element of the underlying offence of quintuple murder. The majority opinion of Chief Justice Rehnquist

rejected this appeal, holding that aggravating circumstances are not an end in themselves, but instead "a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion," as required by *Zant v. Stephens*.⁷⁸ Chief Justice Rehnquist held that the required narrowing took place at the guilt phase when the defendant was found guilty of the particular crime of murder with "specific intent to ill or to inflict great bodily harm on more than one person."⁷⁹

Unsurprisingly, Justices Marshall and Brennan offered a strong dissent in *Lowenfield*, and a number of the criticisms they articulate there in reference to the "multiple victim" aggravator are equally applicable in the context of the CF aggravator. Marshall and Brennan began by arguing that, contrary to the majority's opinions, the Court's previous cases *did* in fact reflect the principle that the sole aggravator cannot duplicate an element of the underlying offence and still make the offender death-eligible.⁸⁰ The dissenters then stated the obvious: due the "complete overlap" of the factual matter contemplated by an element of a crime with that contemplated by a statutory aggravator, the sentencing hearing inevitably tilts towards the imposition of the death penalty.⁸¹ Marshall and Brennan sought to show specifically how commonly-duplicative aggravating circumstances such as the "multiple victim," "vile murder," and CF aggravators prejudice the defendant at sentencing. The state "enters the sentencing hearing with the jury already across the threshold of death eligibility"—by virtue of the elements of the crime itself—"without any awareness on the jury's part that it had crossed that

⁷⁵ *Supra* note 18, at 396.

⁷⁶ *See Lowenfield v. Phelps*, 484 U.S. 231, 232 (1988).

⁷⁷ *Id.*

⁷⁸ *Id.* at 244.

⁷⁹ *Id.*

⁸⁰ *Id.* at 255 (Brennan and Marshall, JJ., dissenting.)

⁸¹ *Id.* at 258.



line.”⁸² At sentencing, the state will then face less resistance in arguing for death because it can remind the jury that it already found an aggravator by convicting the defendant at the guilt phase.⁸³ Even worse, aggravator “duplication” affects the guilt phase of the trial too: as a matter of human psychology, the prosecution will have an easier time convincing the jury of guilt beyond a reasonable doubt if the jury remains unaware that finding that element will automatically make the defendant death-eligible at sentencing.⁸⁴

Lowenfield-type “duplication” claims represent a preferable basis on which to challenge the consideration of the CF aggravator in felony murder cases; unlike Fourteenth Amendment challenges, they do not chance the United States Supreme Court’s state-friendly equal protection jurisprudence. Whereas equal protection challenges might fail by basing their claims on a comparison of felony murderers and premeditated murderers, *Lowenfield* “duplication” challenges make an appeal to the core concern of post-*Furman* capital sentencing, the jury as “the guardian and articulator of society’s moral code and conscience in the criminal trial.”⁸⁵ In fact, Marshall and Brennan seem to express their point in explaining how duplicative aggravators bring the unwitting jury “across the threshold of death eligibility” as much in terms of institutional respect for the jury as of fairness to the defendant.⁸⁶ Perhaps this represents a strategy of “calling the bluff” of death penalty advocates who defend capital sentencing by pointing to the process of guided jury discretion as a bulwark against arbitrariness.

The CF aggravator is troubling precisely because of its mechanical, *non*-discretionary operation in felony murder cases. Garnett argues that the “heinous, cruel, and depraved,” aggravator “is so emotionally loaded and conceptually amorphous that it may fail as a check on arbitrary sentencing.”⁸⁷ Thus, whereas criticism of “vile murder” aggravators focuses on their potential for abuse of discretion and arbitrariness, the criticism of the CF aggravator could be stated as the inverse: for felony murderers, the CF aggravator operates too “automatically” and mechanically, making a defendant eligible for the death penalty by virtue of the underlying elements of his crime proved at the guilt phase. In fact, the danger of “automatic” death penalty eligibility caused by the CF aggravator in felony murder cases may actually be greater in real terms than the danger of “arbitrary” death penalty eligibility caused by the “heinous, cruel, and depraved” aggravator. While trial courts could potentially mitigate the amorphousness and over-inclusiveness of the “heinous, cruel and depraved” aggravator by statutory interpretation,⁸⁸ this “reading down” logic simply does not apply to the CF aggravator. As a simple matter of logic, the aggravator is engaged whenever the first-degree murder conviction rests of a felony murder theory. Barring some procedural limit to the availability of the CF aggravator when the first-degree murder conviction rests on felony murder theory (see below), it is possible that the aggravator will act as the “gateway” circumstance (the minimum of one aggravator required for all death eligibility) and permit the jury to proceed to the more opaque process of weighing aggravating and mitigating circumstances.

⁸² *Id.*

⁸³ *Id.* at 257-58 (discussing that the prosecutor at trial twice reminded the sentencing jury of precisely this fact.

⁸⁴ *Id.* at 247.

⁸⁵ Schwartz, *supra* note 15, at 867.

⁸⁶ See *Lowenfield*, 484 U.S. at 258.

⁸⁷ Garnett, *supra* note 60, at 2480.

⁸⁸ See David Pannick, JUDICIAL REVIEW OF THE DEATH PENALTY 97 (1982).



Again, the felony murderer is always free to adduce a lack of intent to kill as a mitigating circumstance,⁸⁹ which may well be compelling to a jury alongside other mitigating circumstances. However, regardless of whether felony murderers in fact do receive death sentences primarily because of the CF aggravator, it exposes them to the greater *possibility* of a death sentence, and to the contingencies and vicissitudes of jurors' subjective views on the weight of aggravating and mitigating circumstances, all of this in effect because of their lack of premeditation. This is "sentencing disproportionality" at work.

IV REFORM: "DUAL CULPABILITY SENTENCING"

In light of the proportionality concerns related to felony murder as a theory of first-degree murder, perhaps the most obvious possible reform is to eliminate the death penalty as a punishment for those convicted of first-degree murder on a felony murder theory. This reform would exclude felony murder from the scope of what constitutes a capital offence, continuing on the trajectory of the Court decision in *Coker v. Georgia*, which excluded rape from the category of capital offences.⁹⁰ As noted above, the California Commission on the Fair Administration of Justice, in its 2008 final report, recommended taking a step further along this path by excluding felony murder from eligibility for the death penalty.⁹¹

However, this essay proposes the more modest reform of prohibiting the consideration

of the CF aggravator when the first-degree murder conviction is based on a felony murder theory, in keeping with the ideal of "dual culpability" sentencing. In effect, this reform would separate out the respective lists of available aggravating circumstances in sentencing statutes depending on whether the first-degree murder conviction rested on a premeditation or felony murder theory, creating two parallel tracks for capital sentencing. Just as Binder's "dual culpability" formulation of the merger doctrine requires a discrete type of culpability aside from violating the victim's interest in physical integrity,⁹² "dual culpability" sentencing would require a felony murderer to have demonstrated culpability in more than the way captured by the felony murder conviction itself. Under Florida's sentencing statute, this required second form of culpability could take a variety of forms: that the defendant is a gang member, that the victim was a police officer, child, person with a disability, or public official, that the murder was committed to avoid arrest, or any other form of culpability encapsulated by the other remaining available aggravators.⁹³

If applied in a state such as Florida, this sentencing scheme would prevent juries from considering the CF aggravator at the sentencing stage in any cases where there is a possibility that the jury found a capital defendant guilty of first-degree murder solely on a felony murder theory—in other words, whenever there is not the "separate" culpability of premeditation in addition to the culpability related to the felonious purpose. If applied in Florida, this category would include cases in which the conviction rested solely on a felony murder theory such as *Menendez*⁹⁴ or *Rembert*⁹⁵ or cases

⁸⁹ See, e.g., *White v. State*, 403 So.2d 331, 336 (Fla. 1981).

⁹⁰ *Coker v. Georgia*, 433 US 584, 598-560 (1977).

⁹¹ CAL. COMM. ON THE FAIR ADMIN. OF JUST., *supra* note 16, at 138-39.

⁹² See Binder, *supra* note 3, at 519.

⁹³ FLA. STAT. ANN. § 921.141(6) (West 2017).

⁹⁴ See *Menendez v. State*, 419 So.2d 312, 314 (Fla. 1982).

⁹⁵ See *Rembert v. State*, 445 So.2d 337, 337 (Fla. 1984).



in which the jury returned a general verdict at the guilt phase and did not specify whether the first-degree murder conviction rested on a pre-meditation theory or a felony murder theory, such as *Hurst v. Florida*.⁹⁶

As Colón notes, restricting the array of statutory aggravators with an eye to reducing the overall number of death sentences “could result in a statutory policy which would not necessarily reflect the values of the community.”⁹⁷ However, prohibiting the consideration of the CF aggravator in felony murder cases would be only a continuation along the states’ progress on legislative reform in the post-*Furman* era, rather than a change in kind. The Supreme Court has rejected the categorical approach to capital sentencing, which would automatically inflict the death penalty on certain categories of crimes, such as the murder of children or police officers.⁹⁸ As suggested by Koch et al., as a matter of state-level political debate on criminal sentencing, advocates of the death penalty are able to leverage the legislative efforts to restrict death penalty liability to “the most despised offenders” to counter the rhetorical advantage of pro-abolition advocates in calling the penalty uncivilized or random.⁹⁹ However, the legislative narrowing of death penalty liability through statutory aggravator requirements *also* increases the gulf between inchoate public sentiment on the moral blameworthiness of particular offenders and the eventual results in capital trials. Put simply, laypersons reading about a capital case in the newspaper—and the pro-death penalty state legislator—are not constitutionally obligated to consider and weigh mitigating

circumstances, unlike the post-*Furman* capital juror. Outside the capital sentencing process, laypersons can ignore mitigating circumstances at will, focusing on the most provocative and disturbing elements of the crime. Seen this way, post-*Furman* capital statutes, including aggravating and mitigating factors, are at the same time an attempt to channel and control the public’s inchoate and visceral intuitions on who deserves the death penalty and therefore *also* a negation of the value of those intuitions as legitimate determinants of actual sentences.¹⁰⁰

As capital sentencing stands now, a juror’s own views about the proportionality of death as punishment are relevant only insofar as they fit into the process of guided discretion. Courts no longer look to the rationality and even-handedness of sentencing decisions themselves, but only to their procedures.¹⁰¹ In the post-*Furman* era, the results-oriented inquiry into proportionality, if it ever existed, has been transformed into an ongoing assessment of procedure.¹⁰² As Baldus et al. note, and as the compounding of guilt disproportionality and sentencing disproportionality demonstrates, seeing sound procedure as coextensive with fair and proportional sentencing requires a leap of faith not always justified empirically.¹⁰³

Though it would have a disproportionate impact on the number of death sentences imposed,¹⁰⁴ the modest reform of excluding the CF aggravator from capital sentencing of felony murderers’ cases would simply be an extension of the logic of guided sentencing that would not

⁹⁶ See *Hurst v. Florida*, 136 S.Ct. 616, 620 (2016).

⁹⁷ Colón, *supra* note 50, at 1413.

⁹⁸ Larry W. Koch, Colin Wark & John F. Galliher, *THE DEATH OF THE AMERICAN DEATH PENALTY: STATES STILL LEADING THE WAY* 167 (2012).

⁹⁹ *Id.*

¹⁰⁰ See *Lowenfield v. Phelps*, 484 U.S. 231, 257; See also Bessler, *supra* note 1, at 283.

¹⁰¹ Baldus, *supra* note 44, at 26.

¹⁰² *Id.*

¹⁰³ *Id.* at 27.

¹⁰⁴ See Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and the Reform of the Model Penal Code*, 105 COLUM. L. REV. 1396, 1403 (2005); Baldus, *supra* note 44, at 22.



fundamentally change the relationship of state legislatures to the capital jury in exercising its discretion. The epochal change has already taken place, in the *Furman* shift to guided discretion and automatic appellate review.¹⁰⁵ The moral impulse of just deserts has been eclipsed by procedure as a concrete manifestation of the goals of morality and proportionality.¹⁰⁶ As Garnett writes, “[a]ggravating factors, properly applied, should and can insure that only the most blameworthy defendants are sentenced to death.”¹⁰⁷ Denying a “death-qualified” jury and the state the expedience of the CF aggravator when sentencing a felony murderer could help to make this ideal a reality.

¹⁰⁵ See Bessler, *supra* note 1, at 283, 326; Baldus, *supra* note 44, at 26.

¹⁰⁶ Baldus, *supra* note 44, at 26.

¹⁰⁷ Garnett, *supra* note 59, at 2493.



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ABOUT THE AUTHOR



Wes Dutcher-Walls is a third-year student at the University of Toronto Faculty of Law in Toronto, Ontario. He has also studied at the University of California, Berkeley, School of Law where he won the American Jurisprudence award in constitutional law. He received his undergraduate degree in Political Science and American Studies from the University of Toronto and is an alumnus of the Hertog Fellowship in Washington, D.C. Prior to law school, Wes was a policy advisor in the Ontario provincial government.

As a law student, Wes is interested in criminal law, with a particular interest in sentencing and capital punishment in the United States. In his second year, he competed in the Wilson Moot, a national moot competition focused on equality issues. He is currently a member of the Faculty of Law's Criminal Appellate Externship program. After law school, he will be pursuing a career in litigation.